Supreme Court, U.S.
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No. 91-1423

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RAILROAD COMMISSION OF TEXAS, et al.,
Petitioners

v.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

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Date: July 30, 1992

QUESTION PRESENTED

1. Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. §434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. §421 et seq., in finding that 16 T.A.C. §5.619 is pre-empted?

LIST OF PARTIES

Petitioners:

Railroad Commission of Texas

Its Members: James E. Nugent
Robert Krueger
Lena Guerrero

Respondents:

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

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STATEMENT OF THE CASE

On December 6, 1985, the Railroad Commission of Texas published a set of proposed rules, identified as 16 T.A.C. §§5.616-5.621. No administrative hearing was held, but public comments were solicited and received, including submission of voluminous material and briefing by the respondents. On June 3, 1986, the rules with some modifications were adopted by the Railroad Commission of Texas. Among the rules adopted was 16 T.A.C. §5.619, the only rule still involved in this litigation. Sixteen T.A.C. §5.619 requires construction of walkways on the track roadbed, that zone of soil or rock which supports loads from the track structure and for which zone the Federal Railroad Administration has prescribed minimum specifications.

The railroads/respondents challenged the state rules in the United States District Court, Western District of Texas, Austin Division, and that challenge has traveled from that District Court to the Fifth Circuit Appellate Court, returned to the District Court and then revisited the

Fifth Circuit. The full prior history of the case was presented in Respondents' Brief in Opposition, filed herein on April 2, 1992. The Fifth Circuit rendered its second decision (Missouri Pacific Railroad Co. v. Railroad Comm. of Texas, 948 F.2d 179 (5th Cir. 1991), (hereinafter MOPAC II), on December 6, 1991; it is this appellate decision of which petitioners seek review. The singular ruling of the Fifth Circuit was that 16 T.A.C. §5.619 is pre-empted by federal regulatory coverage of its subject matter. More specifically, the Fifth Circuit held that the state walkway rule is covered by Federal Railroad Administration regulations governing roadbed and track structures.

ARGUMENT

Pursuant to Supreme Court Rule 15.7, respondents submit this supplemental brief to address matters new since we filed our opposition and to advise the Court that, in response to those new developments, respondents now agree with petitioners that certiorari should be granted.

The petition presents questions about the proper interpretation of the express pre-emption provision of §434 of the Federal Railroad Safety Act of 1970, 45 U.S.C. §434, as applied to state regulations requiring walkways on the track structure. Section 434 provides that a state "law, rule, regulation, order or standard relating to railroad safety" is pre-empted once "the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such State requirement."

In their opposition filed on April 2, 1992, respondents took the position that the decision of the Fifth Circuit below, although in conflict with a per curiam decision of the Ninth Circuit, was so clearly correct that this Court should either grant certiorari and summarily affirm or deny certiorari (Opp. pp. 4, 16). Respondents did not take issue with the implicit premise of the State's petition that the recurring question of how to construe §434 is an important one warranting this Court's attention.

On April 27, 1992, this Court invited the Solicitor General to present the views of the United States as to a petition (No. 790) and cross-petition (No. 91-1206) seeking review of an Eleventh Circuit's decision in another case concerning §434. Easterwood v. CSX Transp., Inc., 933 F.2d 1548

(11th Cir. 1991). There the court of appeals held that §434 pre-empts state tort law as applied to train speed but not as applied to grade crossing design. On June 8, 1992, the Solicitor General submitted a memorandum urging the Court to grant both petitions in view of the importance of these recurring issues under §434 and the conflict among the lower courts concerning the grade crossing issue. Noting that the issues involve "considerable difficulty and complexity" (U.S. Br. 15), the Solicitor General did not take a position on the merits of the questions presented by the petitions in Easterwood. On June 29, 1992, the Court granted both petitions.

In addition, since the filing of respondents' opposition the Court has also decided three cases involving the interpretation of express pre-emption provisions: Morales v. Trans World Airlines, Inc., 60 U.S.L.W. 444 (June 1, 1992), Gade v. National Solid Wastes Mgt. Ass'n., 60 U.S.L.W. 4587 (June 18, 1992), and Cippolone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (June 24, 1992). In these cases, various sharply divided majorities or pluralities have resolved pre-emption issues in ways that may have a bearing on the issues raised by the Easterwood petitions or by the petition in this case.

Respondents now believe, in view of these developments, that the Court should grant the State's petition. This case provides a useful vehicle for the Court to address the important type of pre-emption question also raised in Easterwood, but in a context in which those issues were central and which may provide a more developed context for the Court's decision, and which involves an additional aspect of the issues concerning §434.

A threshold question in Easterwood, particularly as to the grade crossing issue, is whether §434's pre-emption is triggered only by regulations issued by the Secretary under the Rail Safety Act (as the Eleventh Circuit held), or also by regulations issued by the Secretary under other laws, such as the federal highway laws (as the Secretary and the Solicitor General contend). There is no such threshold question in this case.

As to both issues in Easterwood, moreover, there is a question,noted by the Solicitor General (U.S. Br. pp. 18-19), of determining what "requirement" of state law is at issue and whether it is among the categories of state-created legal obligations pre-empted by §434. There are no such concerns in this case.

The Eleventh Circuit's decision concerning the speed limit considered and rejected a contention that §434 applies only when state and federal requirements concerning the same subject matter have the same objectives, motives or purposes. The court's rejection of that contention (933 F.2d at 1553-54) is consistent with the decision below in this case (where the State made the same contention) but is at odds with the Ninth Circuit's decision in another recent case involving state walkway requirements, Southern Pacific Transp. Co. v. Public Util. Comm'n, 820 F.2d 111 (9th Cir. 1987) (the case cited as conflicting with MOPAC II by the State in the instant case).

This case presents an additional and fundamental question not decided in Easterwood as to either the grade crossing or speed limit issue, i.e., what constitutes the same "subject matter" under §434. It is not at all clear that the Court's resolution of Easterwood will provide guidance on this basic question under §434.

Finally, the Fifth Circuit's decision in this case was based on an extensive factual record concerning the conflict and impact of the state walkway regulation requirements on the federal requirements concerning track roadbed. This factual record may also be important to an analysis of the "subject matter" under §434. We understand that there is not a comparable record as to the issues presented in Easterwood.

For these reasons, respondents submit that the Court should grant the State's petition so that it can consider the pre-emption issues in a more developed context where the fundamental question is inescapably presented. We note that, since the Court has not yet scheduled oral argument in Easterwood, there should be no problem in considering the cases in tandem, if the Court wishes to do so.

In the alternative, if the Court does not grant certiorari now, it should hold the case pending disposition of Easterwood and then grant certiorari if that case is decided on grounds other than the questions of the proper construction of §434.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing instrument was served upon Mr. Douglas Fraser, Assistant Attorney General, Energy Division, 1124 S. IH-35, 2nd Floor, Austin, Texas 78704, by Hand Delivery in accordance with Fed. R. App. P. 5 on this 30th day of July, 1992.

Robert B. Burns, Jr.